IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 535 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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ANANT CONSTRUCTION CO.

Versus

PRAJAPATI JOITARAM CHAGANLAL CO. THRO' PARTNER

Appearance:

1. Civil Revision Application No. 535 of 2002

MR NEHAL R JOSHI for Petitioner No. 1

MR MB GANDHI for Respondent No. 1

CORAM : MR.JUSTICE D.K.TRIVEDI

Date of decision: 06/05/2002

ORAL JUDGEMENT

Rule. Mr. Gandhi, learned advocate waives service of Rule on behalf of respondent - original plaintiff. Rule is fixed forthwith. Heard Mr. Joshi, learned advocate for the petitioner - original defendant and Mr. Gandhi for the respondent - original plaintiff. The challenge in this revision application is in respect of the order passed by the learned Chamber Judge of the

City Civil Judge, Ahmedabad Court no. 13 dated 19th October, 2001 below application Ex. 1 in Civil Misc. Application No. 795 of 2000, wherein, the learned Chamber Judge has rejected the application of the petitioner- defendant, wherein, the petitioner has prayed for setting aside the ex-parte decree passed in Civil Suit No. 476 of 1999 dated 20th October, 2000 and prayed for restoration of the said suit. As found from the petition, an application under Section 37 Rule 4 as well as under Section 151 of the C.P.C. supported with an affidavit of Shri Tushar Gajjar dated 20th November, 2000, who is one of the partners was submitted, wherein, it is his case that the decree was passed on 20th October, 2000 and as the said decree was passed ex-parte, the petitioner has prayed for relief by highlighting in his affidavit that Shri Tusharbhai Gajjar, who was the partner, was not in a position to attend the court and as summons for judgement was taken out, it was not possible for the petitioner to attend the court. It is further found from his affidavit that his daughter has sustained injury, for which, she was under treatment at Harihant Orthopedic Hospital and she was operated on 27th October, 2000 and it was not possible for him to file leave to defend and prayed that decree, which was passed on 20th October, 2000, be set aside and the suit be restored.

2. The learned Chamber Judge has while considering the application and the contentions raised before him that the ex-parte decree was passed, has not accepted the case of the defendant as according to the Court, sufficient opportunity was given to the defendant and further no evidence is produced regarding ailment of daughter of Tushar Gajjar. Learned Chamber Judge has also held that the decree is not an ex-parte decree and further, no error is committed. Mr. Joshi, learned advocate for the petitioners has submitted that in view of the claim put forward by the plaintiff, there is a triable issues and even considering the claim of the plaintiff, the same is also time barred and accordingly, he submitted that opportunity be given to him to defend the case and accordingly, prayed for setting aside the said order. In support of his submission, he has placed reliance on the decision reported in AIR 1966 AP 136 and AIR 1990 Rajasthan p.18.

3. Mr. Gandhi, learned advocate for the respondent-plaintiff has supported the order. According to him that reading the order itself, it clearly transpires that decree, which was passed, cannot be said that the said decree is an ex-parte decree. Even as found from the order, opportunity was given to the

petitioner-defendant and inspite of that, leave to defend was not submitted and further the stand taken by the petitioner that daughter of Tushar Gajjar was seriously injured but however, as found from the record, it is found that the all the legal proceedings were conducted by Mr. Joshi and it would not be opened to contend that Mr. Gajjar could not attend the matter due to injuries sustained by his daughter and it would not be possible for him to attend the Court. Mr. Joshi was one of the partners and could have taken steps to file leave to defend application. It is the contention of Mr. Gandhi that it is not true that no opportunity was given to the defendant and accordingly, he prayed for dismissal of the revision application.

4. Considering the submissions made before me and on examining the order passed by the learned Chamber Judge and the contentions raised in the revision application, it transpires that Civil Suit was filed by the respondent plaintiff in the Court of City Civil at Ahmedabad in the year 1997 and the plaintiff has claimed a decree for sum of Rs.46,000/- against the defendant with interest at the rate of 18% p.a. The claim of the plaintiff is in respect of purchase of bricks on several occasion in the year 1992-93 and inspite of the supply of bricks to the defendant, the defendant has failed to pay the amount of the goods namely bricks received by the defendant and the plaintiff has also annexed the extracts of books of accounts maintained by the plaintiff and accordingly, the plaintiff has also claimed interest at the rate of 18% p.a.

5. The summons for judgement was taken out by the plaintiff. That the application for time sought for by the defendant was rejected by the learned Chamber Judge, on 19.10.2000 the Court has decreed the suit in favour of the plaintiff. The application of the defendant under Order 37 Rule 4 for praying for quashing and setting aside decree was filed on the ground that the decree is passed ex-parte and as found from the order, the learned trial Judge has decreed the suit considering the fact that the defendant has not taken out any leave to defend application, though time was granted, after rejecting the application for adjournment and decree was passed on 20th October, 2000.

6. In my view, learned Chamber Judge ought to have imposed costs by giving opportunity to the petitioner-defendant. Accordingly, this Court is of the view that the ends of justice will meet by giving opportunity to the petitioner-defendant by awarding costs

to the petitioner and accordingly, while setting aside the order under challenge, the petitioner defendant is directed to deposit a sum of Rs.3000/- before the trial Court as quantified by this Court within three weeks from today. The respondent is at liberty to withdraw the said amount without any security. As the vacation is in progress, the petitioner is directed to file leave to defend application after reopening of the vacation on 21st June, 2002. The revision application is accordingly allowed in above terms. Rule is made absolute in above terms.

(D.K.Trivedi,J.)

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